REPORT ON PROPOSED AMENDMENTS TO NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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The undersigned members of the Committee on Civil Litigation of the United States District Court for the Eastern District of New York are pleased to submit the following report commenting on the amendments to the New York Lawyer's Code of Professional Responsibility that have been proposed by the New York State Bar Association's Special Committee to Review the Code of Professional Responsibility in its Report to the House of Delegates dated February 29, 1996.[1]

PREFATORY NOTE

Prior to the enactment of the Civil Justice Reform Act of 1990 the United States District Court for the Eastern District of New York had in place a Committee on Civil Litigation comprised of lawyers with widely varying practices, academicians and Court personnel, which advised the Court on various matters affecting the civil justice system in the Court. Such a Committee, under various names, had been advising the Court since November 30, 1982. See 142 F.R.D. 185, 195-196. With the advent of the Civil Justice Reform Act the Court's Committee on Civil Litigation was further enlarged, including with the addition of non-lawyers, and appointed as the Advisory Group pursuant

[1] This report reflects the views of the Committee and does not necessarily reflect the views or represent the recommendations of the individual members with respect to each of the various issues discussed.

to the Act. Thus, currently this body functions as both the statutory Advisory Group and the Court's Committee on Civil Litigation (hereinafter referred to as the "Committee").

BACKGROUND

Under General Rules 2(a) and 4(f) of the Rules of the United States District Courts for the Southern and Eastern Districts of New York, which identify the ethical codes that a lawyer admitted to the Eastern District must obey, a lawyer may be subject to discipline if, after notice and an opportunity to be heard, he or she is found guilty by clear and convincing evidence of "conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force. . . ."

By letter dated March 26, 1993 to then Chief Judge Platt, Professor Stephen Gillers of the New York University School of Law identified a problem presented by the current Rules given (a) the abandonment of the Model Code of Professional Responsibility ("Model Code") by the American Bar Association ("ABA") in favor of the Model Rules of Professional Conduct ("Model Rules"), and (b) the subsequent rejection of the Model Rules by the New York State Bar Association, which continues to adhere in substantial part to the Model Code. The net result is that lawyers practicing in the Eastern District under the current Rules are subject to two sets of ethical rules which are materially inconsistent in a number of respects. Without promoting one set of Rules over another, Professor Gillers suggested that the Court consider amending its Rules to avoid confusion among practitioners. Then Chief Judge Platt promptly forwarded Professor Gillers' letter to the Chair of the Committee and asked the Committee to consider the matter.

The Chair thereupon appointed a Subgroup on Ethics, currently comprised of Richard W. Reinthaler, Esq., Chair of the Subgroup, and members Joel Berger, Esq., Robert N. Kaplan, Esq.,

C. Evan Stewart, Esq. and Lawrence J. Zweifach, Esq.[2] The Subgroup met on May 18, 1993 to consider the matter, which was followed by several exchanges of correspondence and numerous telephone conversations among members of the Subgroup in an effort to achieve consensus. The conclusions reached by the Subgroup were then reported to the full Committee, which discussed the matter at length at its July 7, 1993 meeting. Following that meeting, a draft preliminary report and recommendation was prepared by the Chair of the Committee, which was then distributed to the full Committee and considered and approved at a meeting on August 24, 1993. The preliminary report and recommendation was then transmitted to the Board of Judges.

In its preliminary report and recommendation, the Committee noted its agreement with Professor Giller's assessment of the problem caused by the current Rules and expressed its belief that Rules 2(a) and 4(f) should be amended to specify one set of rules of general application to all lawyers practicing in the Eastern District. It concluded that the most appropriate set of rules to apply was the New York Code, and not the ABA Model Code or Model Rules.

In reaching this conclusion, the Committee noted that Federal courts have the inherent power to determine, as a matter of Federal law, which disciplinary rules should govern the conduct of lawyers appearing in Federal court. In re Snyder, 472 U.S. 634, 645 n.6 (1985). It was further noted that the majority of District Courts had adopted by way of local rule the disciplinary codes of the forum states in which they sat, as amended from time to time, rather than either the ABA Model Code or Model Rules. While it appeared that some District Courts had specified certain state rules they will not follow, the Committee noted that most District Courts had simply adopted one set of rules in its entirety.

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[2] Also participating in the deliberations of the Subgroup, in an ex officio capacity, was Victor J. Rocco, Esq.

Although the "legislative history" of Rule 4(f) was not available to the Committee, the language of the current Rule appeared to suggest that the original intent was to follow the New York Code of Professional Responsibility, which at the time was substantially identical to the ABA Model Code. Case law in this Circuit appeared to confirm this conclusion, see Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (Francis, M.J.), aff'd, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990) (Haight, D.J.), although precedent also existed suggesting that in interpreting the New York Code Federal judges may also look to the ABA Model Rules for guidance. See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989) (Weinstein, D.J.); see also Rand v. Monsanto, 926 F.2d 596 (7th Cir. 1991).

In light of the fact that the New York Code had been amended in significant respects and was therefore no longer substantially the same as the ABA Model Code (which, in turn, has been rejected by the ABA and replaced by the Model Rules), the Committee concluded that the current language of Rule 4(f) no longer made any sense and should be revised. While noting that all lawyers practicing in Federal court should be familiar with the ABA Model Code and Model Rules, as well as the specific rules adopted by the states in which they are admitted, the Committee concluded that the need for predictability and certainty strongly weighed in favor of having one set of rules applicable to lawyers appearing in the Eastern District.

As noted above, the Committee recommended (with one member dissenting) that the one set of rules that ought to apply in the Eastern District should be the New York Code rather than the ABA Model Rules or Model Code. The Committee concluded that adopting the New York Code would enable lawyers practicing in both the Federal and state courts in this District to be governed fundamentally by the same set of ethics rules.

It was recognized, however, that conflicts can (and do) arise between Federal policies and principles and the ethical rules contained in the New York Code. In such cases, state rules have given way to overriding Federal policies. See, e.g., County of Suffolk, supra, and Rand, supra. The Committee noted that one way of dealing with such conflicts would be to expressly recognize via Local Rule the flexibility afforded federal judges in interpreting and applying the rules in individual cases in light of overriding Federal policies and principles. Alternatively, the Committee indicated that it could engage in a detailed rule-by-rule analysis in an effort to determine whether the specific provisions of the New York Code were preferable, from a Federal policy standpoint, to those contained in the ABA Model Rules. This latter approach, it was recognized, would present a difficult, time-consuming and controversial task, and the Committee questioned its jurisdiction to engage in such an analysis absent a specific request from the Court. It thus recommended the adoption of a Rule that would afford Federal judges flexibility in individual cases to apply a standard more lenient than that provided in the New York Code, while indicating its preparedness to engage in a rule-by-rule analysis if so requested by the Court.

Finally, the preliminary report and recommendation urged the continued utilization of the "clear and convincing" standard of proof in determining whether Rule 4(f) has been violated. The report noted that the clear and convincing standard has long been the threshold of proof in disciplinary proceedings both in this District and in the Southern District of New York, and that all of the reported Federal cases involving discipline of attorneys practicing in Federal court have applied the clear and convincing standard. In re Medrano, 956 F.2d 101 (5th Cir. 1992); Matter of Thalheim, 853 F.2d 383 (5th Cir. 1988); In re Fisher, 179 F.2d 361 (7th Cir. 1950); In re Levine, 675 F. Supp. 1312 (M.D. Fla. 1986); In re Ryder, 263 F. Supp. 260 (E.D. Va. 1967). But cf. Charlton v. FTC,

543 F.2d 903 (D.C. Cir. 1976) (applying preponderance of the evidence standard to attorney disciplinary proceeding before Federal administrative agency).

The Committee's review of state court decisions also revealed that by far the most common standard applied in attorney disciplinary proceedings is the clear and convincing standard (see Wolfram, Modern Legal Ethics 108-110 (1986), for a listing of state cases applying the clear and convincing standard). It noted that a handful of states, however, including New York, had applied the preponderance of evidence standard in attorney disciplinary proceedings. See, e.g., In the Matter of Capoccia, 59 N.Y.2d 549, 466 N.Y.S.2d 268 (1983) ("It has consistently been held by the Appellate Divisions that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence.").

While endorsing the substantive standards adopted by the New York State courts, the Committee concluded that, given the serious consequences that may flow from disciplinary proceedings, and the long-standing rule in the Eastern District, an enhanced standard of proof remained appropriate.[3]

The Board of Judges, after considering the preliminary report and recommendation, requested the Committee to undertake a detailed rule-by-rule analysis of the rules of ethics that should apply in the Court. A press release dated January 10, 1994 was issued announcing that a

[3] In addition to considering the standard of proof utilized under Rule 4(f), the Subgroup also has been studying the procedures used by the Eastern District to discipline attorneys who previously had been disciplined by state courts, as well as attorneys who are charged with improper conduct in connection with activities before the Eastern District. Members of the Subgroup have been discussing these procedures with judges on the Court, attorneys and representatives from the Clerk's Office. It also has had discussions with staff members of local grievance committees. With regard to the imposition of discipline by the Eastern District on attorneys who previously had been disciplined by a New York State court, the Subgroup has also been examining the legal issues which arise from the fact that the State of New York employs the fair preponderance standard in disciplinary proceedings, while the Eastern District uses the clear and convincing standard. The Subgroup will be issuing a separate report on these disciplinary procedures later this year.

"working group" (i.e., the Subgroup) had been appointed to consider and report on the matter to the full Committee, and that the working group had requested several academic authorities on ethics to act as a special Advisory Panel, to bring their collective experience and learning in the area to the deliberations of the working group. The Advisory Panel was comprised of Professors Monroe Freedman of Hofstra University Law School, Stephen Gillers of New York University Law School, Marjorie Silver of Touro Law Center and Carol Ziegler of Brooklyn Law School.

In the release (which was published several times in the New York Law Journal) the Court stated that the working group had been asked "to explore all options without preconceived notions as to the outcome of their analysis" and that it would be "considering both the ABA Model Rules and the New York Code, and it may recommend one or the other in its entirety, or it may recommend some combination of the two sets of rules, or it may recommend some entirely different rules." Consistent with past practice, Chief Judge Platt announced that even while the study was ongoing, and before recommendations were formulated, public comments were welcome and should be submitted in writing on or before February 18, 1994 to Messrs. Wesely and Reinthaler.

Two written comments were received. By letter dated February 18, 1994, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York urged the Eastern District to "embrace the Code of Professional Responsibility as adopted and amended from time to time by the Appellate Divisions. . . ." Doing so, it was urged, would promote uniformity and clarity and avoid situations in which a lawyer could be subject to discipline by the Federal courts for conduct required by the lawyer's state of admission (presumably New York). The Committee recognized, however, that in certain circumstances principles of Federal law or procedure may require exceptions to the uniformity they proposed, and that supplemental rules may be needed to address particular problems that are not addressed in the New York Code. In such circumstances,

the Committee stated that they "hoped" that any modifications to the ethics rules that would impose greater restrictions on attorneys would be applied prospectively in order to provide the Bar with adequate notice.

The second comment letter, dated February 25, 1994, was received from the Association of the Bar's Committee on Professional Responsibility, which also urged the Court to adopt the New York Code "to the extent the Code is consistent with federal law and the procedural rules prescribed by the United States Supreme Court." The Committee explained the metamorphosis of the current New York Code, noting that it had been amended to include certain provisions from the ABA Model Rules, and expressed concern about engaging in a rule-by-rule analysis, which according to the Committee, in addition to being time-consuming, "could potentially result in yet another conflicting set of ethical standards governing lawyers' conduct." The Committee recognized that, to the extent Federal judges in individual cases believed that application of the New York Code would be inconsistent with Federal law or policy, they could apply a different standard, but urged that no lawyer be disciplined for violation of a newly-established standard as to which the lawyer had no prior notice.

The Subgroup thereafter met, both alone (on October 19, 1993 and June 2, 1994) and in conjunction with the special Advisory Panel (on February 24, 1994), to discuss the parameters of the task they had been asked to undertake. Notwithstanding the continued concern expressed by a majority of members with respect to the advisability of engaging in a rule-by-rule analysis, the Subgroup concluded that in order to fulfill the mandate of the Court, it would be necessary, first, to identify the principal areas of conflict between the New York Code and the ABA Model Rules applicable to the conduct of litigation in the Eastern District. The Subgroup agreed that, given the Committee's previously expressed preference for the New York Code over the ABA Model Rules,

a rebuttable presumption ought to exist in favor of the New York Code provision over its Model Rule counterpart and that lawyers in Federal court should not, absent some overriding Federal policy or principle, be subjected to a more stringent standard than required by the New York Code. Within these parameters, the Subgroup, with the assistance of the Special Advisory Panel, identified the following subjects for discussion:

1. Candor toward the Tribunal: DR 7-102(B) v. MR 3.3(a) and (b).

2. Preservation of Confidences and Secrets -- The Crime/Fraud Exception: DR 4-101(C)(3) v. MR 1.6.

3. Alteration, Suppression or Destruction of Evidence: DR 7-109(A) v. MR 3.4(a).

4. Requesting Non-Clients to Refrain from Voluntarily Giving Relevant Information: MR 3.4(f).

5. Conflicts of Interest: Simultaneous Adverse Representation: DR 5-101(A) and 5-105(D) v. MR 1.10.

6. Imputed Disqualification/Screening: DR 5-105(D), 5-109 and 9-101 v. MR 1.9 and 1.10.

7. Communications with Persons Represented by Counsel: DR 7-104(A)(1) v. MR 4.2.

8. The Entity as a Client: EC 5-18 and DR 5-109 v. MR 1.13.

9. Prohibited Business Transactions with Clients: DR 5-104(A) v. MR 1.8(a).

10. Providing Financial Assistance to the Client: DR 5-103(B) v. MR 1.8(e).

11. Trial Publicity: DR 7-103 and 7-107 v. MR 3.6 and 3.8.

12. Choice of Law: MR 8.5.

To assist the members of the Subgroup in considering these issues, a memorandum describing the areas of conflict was circulated in late September 1994, along with a compendium of

selected reference materials, cases and articles. A questionnaire was sent to each member, which framed the issues and formed the basis of the Subgroup's subsequent discussions. Meetings were then held on March 29, April 12, May 9, 16, 24, and June 15, 1995, at which the issues were discussed and debated at length. A draft report was then prepared and circulated for comment to members of the Subgroup and Special Advisory Panel. Following a joint meeting on September 28, 1995, the draft report was revised to incorporate certain of the comments and suggestions of the Special Advisory Panel.[4]

During the course of the Subgroup's consideration of the issues before it, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") began its own review of the issue of the regulation of lawyers practicing before federal courts, and solicited the views of the bar with respect to the issues raised. Two different approaches were identified by the Standing Committee: (a) a uniform national set of standards (such as the Model Rules) or (b) an Erie-style rule directing all federal courts to the proper state ethics law to be applied.

In response to the Standing Committee's request for comments, the Association of the Bar's Committee on Professional Responsibility submitted a lengthy report, dated March 28, 1995, entitled Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation. The report comprehensively described "the current system of patchwork lawyer regulation in federal court" and urged that it be changed "in order to achieve greater predictability and integration of lawyer regulation among the states and the federal judicial system." Report at 1. See also Mullenix, Multiforum Federal Practice: Ethics and *Erie*, 9 Georgetown J. of Legal Ethics 89-159 (1995). The

[4] The recommendations contained in the draft report were those of the Subgroup and did not necessarily reflect the views or represent the recommendations of the members of the Special Advisory Panel.

report noted that, like the Standing Committee, the members of the City Bar Committee were "equally divided on the issue of how best to improve the status quo." The "barest majority" of members, it was reported, favored the adoption of the Model Rules (by Enabling Act, rulemaking on statute) as the uniform national standard. The other half favored the adoption of a "national but state-centered 'bright line' Erie-style choice of law rule directing courts to the proper state ethics law to be applied." Id. at 1-2.[5] The Committee urged the adoption of either approach as preferable to the present system. The Committee also urged that the new rule contain an express safe harbor providing that, prior to the commencement of federal litigation, all lawyer conduct be adjudged in accordance with the ethics rules in effect in the state in which the lawyer primarily practices.

On July 5, 1995, Daniel R. Cocquillette, Reporter for the Standing Committee, issued his report to the Committee, in which he identified "four fundamental options for long-term reform." Cocquillette, Report on Local Rules Regulating Attorney Conduct, presented to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States at 3 (July 5, 1995). One option identified was the adoption of a uniform national set of rules governing attorney conduct in federal courts through the Rules Enabling Act (either the Model Rules or some variation of the Model Rules). A second option identified was the establishment of a uniform national rule adopting relevant state standards in all federal courts. (The Report, however, does not address state rules that may be inconsistent with federal policy.)

A third option would be to attempt the same results through model local rules, following the initiative first begun in 1978 by the Committee on Court Administration and Court

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[5] The Committee recognized that under the Erie-style approach, exceptions to the forum state's rules "can be crafted for situations where deference to a given state's law of lawyering might undermine a compelling federal interest." Id. at 3 n.6. They recommended that such exceptions be made only be Enabling Act rulemaking or legislation by Congress.

Management (i.e., the Federal Rules of Disciplinary Enforcement, which have been adopted, in whole or in part, in 15 Districts). The fourth option would be to do nothing -- which, according to the Reporter, "can only lead to a continuing deterioration of standards, to the disadvantage of all." Id.

The Report concludes with a recommendation that a special invitational session of the Standing Committee be held immediately preceding the next Standing Committee meeting in January 1996, at which representatives of each of the major affected constituencies, including Congressional staffs and the Department of Justice, would be invited. The purpose would be to discuss each of the four fundamental options and to develop a "long-term solution" through the Judicial Conference. A two day conference with this purpose was held on January 9-10, 1996. A second preliminary conference on the subject was held in Washington, D.C., in mid-June 1996, without any resolution being reached.

The Subgroup forwarded its proposed report and recommendations to the full Committee on or about November 21, 1995. The Committee thereafter met on December 11, 1995, January 22, 1996, March 18, 1996, April 8, 22 and 29, 1996, and June 6, 1996, to discuss the proposed report. It was the consensus of the Committee that, notwithstanding the mandate from the Board of Judges to engage in a rule-by-rule analysis and the substantial effort undertaken by the Subgroup, the need for predictability and certainty weighed strongly in favor of having one set of rules rather than a different set of standards applicable in federal court that conflicted with those applicable to lawyers admitted to practice in New York. The Committee unanimously agreed that the New York Code should therefore be adopted as the governing standard for lawyers practicing in the Eastern District of New York. In reaching this conclusion, the Committee noted that the admission, regulation and discipline of lawyers has historically been left to the states, and no member of the Committee voiced an opinion that a separate, inconsistent set of regulations by the federal

courts would be beneficial or cost-effective. Accordingly, the Committee decided to recommend that the rule-by-rule analysis be used either (a) as guidance by federal judges in addressing specific ethical issues or (b) for submission to the appropriate New York State authorities for consideration as proposed amendments to the New York Code.

On February 29, 1996, while the Committee was in the midst of its deliberations, the New York State Bar Association's Special Committee to Review the Code of Professional Responsibility issued its report to the House of Delegates proposing numerous amendments to the New York Code. Included in the proposed amendments are a number of changes that are substantially identical to and/or consistent with the recommendations made by the Subgroup in its proposed report. The Committee thereafter decided to consider each of the applicable "proposed" amendments to the New York Code during the ensuing discussion of the Subgroup's report in order that the final report submitted to the Board of Judges would reflect the views of the Committee regarding the proposed amendments.

Set forth below are the comments of the Committee, together with explanatory notes, with respect to each of the proposed amendments to the New York Code that are relevant to the conduct of litigation in federal court and are thus of special importance to the members of the Committee. The Committee has not considered and thus takes no position with respect to the balance of the proposed amendments to the New York Code. Finally, the last section of this report sets forth a number of additional amendments to the New York Code that we respectfully suggest be considered by the State Bar Association.

1. DR 1-105 Disciplinary Authority and Choice of Law.

The Committee supports the proposed new DR 1-105 which would incorporate the substance of Model Rule 8.5, as amended by the ABA in 1993, into the New York Code in an effort to minimize or eliminate confusion regarding the application of disciplinary rules in the multijurisdictional context.

Although the members of the Committee believe that the adoption of DR 1-105 is clearly preferable to having no choice-of-law rule at all, it was (and is) the consensus of the members that the proposed new DR 1-105 as written is ambiguous and does not provide sufficient guidance to lawyers regarding the applicable standard with respect to pre-complaint conduct, transferred cases or multijurisdictional litigation. In particular, concern was expressed with the "in connection with" language in Subsection (B)(1) of the proposed rule.

With respect to pre-complaint conduct, the issue is whether conduct committed elsewhere in connection with a proceeding subsequently commenced in New York (federal or state) court should be subject to disciplinary action in New York. Proposed new DR 1-105 does not clearly resolve the issue. It is entirely possible, for example, that a pre-complaint investigation may involve contact with witnesses known to be represented by counsel who are located in multiple jurisdictions with differing ethical standards. At the time the pre-complaint investigation is conducted, counsel may not know that sufficient jurisdictional contacts with New York exist, and/or may be contemplating the possibility of litigation in several jurisdictions. Query whether such conduct, if impermissible in New York but permissible in the jurisdiction in which the contact occurred or where the lawyer is admitted or primarily practices, should be subject to disciplinary action in the event suit is later brought in New York or transferred (through application of forum non conveniens or, in the federal context, 28 U.S.C. §§ 1404 and 1407) to New York? Is such conduct "in connection with" a proceeding subsequently commenced here? The Association of the Bar's Committee on

Professional Responsibility, in its March 28 Report on Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation, has suggested that all pre-complaint conduct be governed by the ethics rules of the state in which the lawyer primarily practices. Another possible approach would be to apply the law of the forum to all pre-complaint conduct except where it would be unreasonable for the lawyer to have expected or anticipated the commencement of litigation in that forum. A third approach would be to apply the least restrictive ethical rule where pre-complaint conduct occurs in another jurisdiction; application of such a rule, however, could result in inconsistent standards applicable to the conduct of different lawyers in the same case. Each of the above approaches has some merit; none presents a perfect solution.

The Committee urges the State Bar Association to clarify the new rule by eliminating the ambiguous "in connection with" language in DR 1-105(b)(1) and replacing it with language that will provide sufficient guidance to lawyers with respect to (a) pre-complaint conduct, (b) transferred cases and (c) multijurisdictional conduct.[6] With respect to these three categories, substantial sentiment was expressed by members of the Committee that pre-complaint conduct should be governed by the rules of the state in which the lawyer primarily practices; that the transferor court's rules should govern conduct occurring prior to the date of transfer (or dismissal on forum non conveniens grounds); and that while the rule should apply only to lawyers admitted to the forum, it should encompass all conduct (wherever committed) relating to litigation pending in New York. Thus, lawyers admitted to practice in New York state or federal court should be subject to

[6] The committee recognizes that in the context of multidistrict or multijurisdictional litigation, a lawyer may be subject to differing standards and to the risk of disciplinary action for conduct permissible in one jurisdiction but not in another. Absent the adoption of a uniform federal or state standard, however, this was viewed as a risk that no choice of law rule (other than one providing a safe-harbor for conduct permissible in other jurisdictions) would obviate; in such circumstances, we believe it should impose no undue burden on lawyers to expect them to conform their conduct with the most restrictive set of ethical rules potentially applicable.

disciplinary action for conduct committed by subordinates or associated lawyers in other offices (including conduct abroad). Since one of the purposes of the proposed new rule is to preserve the integrity of the judicial process in New York, all relevant conduct, including conduct abroad, should be subject to scrutiny, and all lawyers admitted in New York should be accountable for the conduct of others whose actions they control.

2. DR 5-101 Conflicts of Interest - Lawyer's Own Interests.

The Committee supports the proposed amendments to DR 5-101 and EC 5-3. These changes are intended (a) to expand the rule to take into account circumstances in which the interest giving rise to the conflict arises after the inception of the attorney-client relationship, (b) to incorporate the limitations on consent found in DR 5-105, and (c) to clarify the disclosure required in these circumstances. The change also requires exercise of the lawyer's own judgment regardless of client consent, a concept missing from the prior text but added several years ago by interpretation. See N.Y. State Bar Op. No. 595 (1988). The members of the Committee also believe that the "reasonably believes" standard embodied in DR 5-105(c), as it is proposed to be amended, should be the governing standard under DR 5-101.

In reviewing the text of DR 5-101 and 5-105, however, the Committee identified one other issue that the State Bar Association may wish to consider, i.e., whether the standard for determining whether there is a conflict of interest should in all instances be one of (a) reasonable possibility or (b) reasonable probability of an adverse effect. The members of Committee believe that the standard employed in DR 5-105(A) and (B), which requires a lawyer to decline employment where the lawyer's exercise of independent professional judgment on behalf of a client "will be or is likely to be adversely affected," is preferable to the "will be or reasonably may be affected" standard

articulated in DR 5-101. We therefore recommend that the text of DR 5-101 be further amended to conform to the text of DR 5-105(A) and (B).

3. DR 5-102 Lawyer as Witness.

The Subgroup, in conducting its rule-by-rule analysis, did not examine DR 5-102 given that no material inconsistency existed between the text of the current Disciplinary Rule and the ABA Model Rules. Upon considering the proposed amendments to DR 5-102 and EC 5-9 and 5-10, however, which are relevant to the conduct of federal litigation, the members of the Committee agreed that (a) the proposed incorporation of a materiality threshold through addition of a requirement that the testimony be on a "significant issue," and (b) the proposed limitation of the prohibition to testimony relating to "issues of fact," are worthwhile changes. However, the members of the Committee are less sanguine regarding the proposed amendment that would allow for "waiver" of the conflict in certain circumstances by the client on whose behalf the lawyer is to be called. The Committee fails to understand how the dual purposes of the rule -- the avoidance of (i) impermissible conflicts of interest and (ii) confusion on the part of the fact finder resulting from impermissible advocacy from the witness stand -- would be furthered by a rule permitting testimony by lawyer/advocates whenever client consent is obtained. It is the interest of the opposing party, not the client, in many instances, that requires protection. The proposed amendment would thus appear to sanction, rather than discourage, testimony by lawyer/advocates on significant issues of fact where the testimony would be helpful to the client. The Committee does not support this approach.[7]

4. DR 5-104 Transactions Between Lawyer and Client.

[7] The State Bar Association, if it has not already done so, may also wish to consider the somewhat different articulation of the advocate as witness rule contained in Section 168 of the ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996).

The Committee expresses no view with respect to the proposed amendments to DR 5-104, EC 5-3 and 5-4.

5. DR 5-105 Conflict of Interest - Simultaneous Representation.

The Committee supports the proposed amendments to DR 5-105 (C) and (D) and the related changes to EC 5-15 and 5-16. Replacement of the vague and unworkable "obviousness" test with the "reasonable belief" standard would represent a major improvement. It is difficult to imagine any case involving multiple representation in which it would be "obvious" that the representation of both clients would be adequate under all future contingencies. Although the "reasonable belief" standard emanates from Model Rule 1.7, the Model Rule provision differs form the New York Code provision in a number of other respects.[8] Except as noted above, the members of the Committee prefer the formulation used in DR 5-105 to that employed in MR 1.7.

6. DR 5-106 Settling Similar Claims of Clients.

[8] In contrast to the New York Code, MR 1.7 appears to equate conflicts created by a lawyer's own interest with those created by multiple clients with differing interests; it talks about conflicts that adversely affect the lawyer-client relationship as opposed to whether a lawyer's "independent professional judgment" is likely to be adversely affected or whether the lawyer can "adequately" represent multiple clients; and it appears to draw a distinction between "direct" conflicts (MR 1.7(a)) and situations in which the lawyer's representation "may be materially limited" by the lawyer's responsibilities to others (i.e., potential conflicts).

With respect to litigation, the Comment to MR 1.7 states that paragraph (a) prohibits representation of opposing parties in litigation, whereas paragraph (b) deals with simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants. The text of the rule itself, however, does not clearly support this distinction, nor does it purport to address conflicts in the litigation context as opposed to other conflict situations.

Commentators have noted that MR 1.7(a) — which deals with direct adversity as opposed to potential adversity — is essentially redundant because all instances of direct adversity will be definition also involve a representation of one client that "may be materially limited" by the lawyer's responsibilities to the other client. See Freedman, Understanding Lawyers Ethics 185-195 (1990). MR 1.7(b) is also broader than MR 1.7(a) to the extent that it focuses on the effect on the representation of, as opposed to the relationship with, the client.

The Committee has not considered the proposed amendments to DR 5-106, which are intended for the most part to expand the scope of the rule to the criminal context, and thus takes no position with respect to such changes.

7. DR 5-108 Conflict of Interest - Former Client.

The Committee supports the proposed amendments to DR 5-108 that would incorporate the substance of Model Rules 1.9(b) and 1.10(b) into the New York Code and would add a new subsection (D) to permit screening to avoid imputed disqualification caused by former client relationships. We also support, for the reasons set forth below, the proposed amendment to EC 5-17 which is derived from the comments to MR 1.9 and comports with the proposed addition of DR 5-108(B), (C) and (D).

The Model Rules and the New York Code contain essentially identical rules on imputed disqualification. The basis for imputed disqualification lies in the assumption that when lawyers work together in a firm, there is a likelihood that they will share information they obtain in the course of representing a client with other lawyers in the firm. Under the substantial relationship test set forth in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953), a court is entitled to presume that a lawyer formerly associated with a firm currently representing a party in litigation, who now works for another firm representing an adversary, gained by virtue of his or her former representation confidences bearing on the subject matter of the case which could be used by the formerly associated lawyer to the detriment of the client of the former firm.

The rule of imputed disqualification (absent client consent) clearly makes sense in the context of lawyers currently associated in the same firm, although critics maintain that in today's modern world of law firm practice there ought to be some relaxation of the rule where the clients of

one office have no contact with lawyers in other offices of a large, multi-national law firm. But see Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (court ordered disqualification even though lawyers involved worked in different offices and never discussed their work with each other). The ability to obtain client consent in such situations, where the representation is limited to local matters, will, as a practical matter, often be sufficient to obviate the conflict.

Where consent cannot be so readily obtained, and where the courts have recognized some need to relax the imputed disqualification rule, is in the context of the lateral movement of lawyers, which is an accepted fact of life within the legal profession today. Federal courts have recognized the harshness of applying a per se disqualification rule in such circumstances and have tended to deny disqualification motions where the lawyer switching firms can show that he or she had not done substantive work for the client (i.e., had not "represented the client") and had not obtained actual knowledge of client confidences. The leading Second Circuit cases allowing the presumption of shared confidences to be rebutted in this way are Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980) (en banc), vacated on other grounds and remanded, 449 U.S. 1106 (1981) and Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

The New York Code as currently drafted provides for automatic disqualification (absent client consent) if the lawyer switching firms had "represented the former client" at his or her prior firm, regardless of whether he or she had obtained actual knowledge of confidences or secrets. The rationale for making the presumption of shared confidences irrebuttable in such circumstances is that clients should not be required to reveal their confidences in order to protect them.

The Model Rules are to the same effect. MR 1.9(a), the counterpart to DR 5-108(a), provides that:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Both provisions are consistent with prevailing Second Circuit case law, as are DR 5-108(b) and its Model Rule counterpart, MR 1.9(c), which provide that a lawyer who has formerly "represented a client" may not thereafter "use any client confidences or secrets obtained to the disadvantage of the former client," thus making clear that a lawyer's duty of loyalty will survive his/her departure for another firm.

Where the New York Code and the Model Rules begin to diverge is in the treatment of a lawyer who did not "represent the client" at his/her former firm. As noted above, federal courts have permitted the presumption of shared confidences to be rebutted in such circumstances. The Model Rules are in line with prevailing Federal case law in this area. MR 1.9(b) provides that, absent client consent, a lawyer "shall not knowingly represent a person in the same or a substantially related matter" in which the lawyer's previous firm had represented a client "(1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter." The Model Rules thus expressly permit the presumption of shared confidences to be rebutted consistent with the result in Silver Chrysler Plymouth.

The New York Code is silent on this point. However, the New York Court of Appeals appears to have accepted the result in Silver Chrysler Plymouth, but only in the large law firm setting. Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128

(1994) ("In smaller, more informal settings, the imputation of knowledge as a matter of law is necessary to protect the client and avoid the appearance of impropriety."). Neither the Model Rules nor federal case law have drawn this distinction.[9] The proposed amendments to the New York Code would eliminate this distinction and bring the New York Code into line with prevailing federal policy.

The proposed amendments go on to deal with another issue that is not addressed in the present New York Code, i.e., whether a departing lawyer's former firm may take on new work for a client with interests adverse to those of its former client. Under MR 1.10(b), the former firm may undertake such representation unless "(a) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (b) any lawyer remaining in the firm has information protected by Rules 1.9 and 1.9(c) that is material to the matter." Although the New York Code does not address this issue, the New York courts have refused to disqualify large firms in circumstances similar to those envisioned by the Model Rules. See Solow v. W. R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 610 N.Y.S.2d 128 (1994). Solow, however, does not mimic MR 1.10(b), which, as noted above, does not draw a distinction between large and small firms. The Committee fully supports the addition of new subsection (C) to DR 5-108.

While the incorporation of MR 1.9(b) and 1.10(b) into DR 5-108 will go a long way towards achieving a fair balancing of competing interests, the inclusion of new subsection (D), which would permit, under the circumstances described therein, the use of "screening" devices by law firms, is also consistent with developing federal policy. It is practically impossible today for law firms in performing due diligence with respect to lateral hires to obtain a list of all clients represented by the

[9] The distinction between large and small firms drawn in Solow has been criticized, among other reasons, on the grounds that the firm in Silver Chrysler Plymouth, which Solow cites, was a firm of 80 lawyers, which at the time was considered large.

candidate's current firm in order to perform a complete conflicts check. In the case of lateral associates, particularly at the junior levels, it may not be fair to assume, even if the associate was working on a particular matter in some tangential way (such as performing a discreet legal research project), that he or she had access to confidences which could be used to the client's disadvantage elsewhere. The imputation of knowledge of all confidences would appear to be unreasonable under these circumstances. See United States v. Bronston, 658 F.2d 920, 931 (2d Cir. 1981) (Van Graafeiland, J., dissenting), cert. denied, 456 U.S. 915 (1982). But even in a case where a lateral hire's former involvement in a matter (i.e., the lawyer had previously "represented the client") is sufficient to raise a problem of imputed knowledge, it may be possible for the new firm to establish screening procedures[10] to eliminate the possibility of any impermissible sharing of confidences.

The use of screening devices has been considered by federal courts in a variety of contexts. Second Circuit cases addressing the issues include Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 757 (2d Cir. 1975); and Laskey Bros. of W. Va. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956). New York District Court cases include Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y. 1989); Yaretsky v. Blum, 525 F. Supp. 24 (S.D.N.Y. 1981); Huntington v. Great W. Resources, Inc., 655 F. Supp. 565 (S.D.N.Y. 1987); Papanicolaou v. Chase Manhattan Bank, 720 F. Supp. 1080 (S.D.N.Y. 1989); and Renz v. Beeman, 1989 WL 16062 (N.D.N.Y.).[11] The most

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[10] Commentators and courts have variously referred to screening procedures as establishing "Chinese Walls," "cones of silence," or "insulation walls."

[11] Other federal court cases upholding or approving the use of screening devices as a means of rebutting the presumption of shared confidences include Panduit Corp. v. All State Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984); Geisler v. Wyeth Lab., 716 F. Supp. 520 (D. Kan. 1989); United States v. Tital Pac. Constr. Corp., 637 F. Supp. 1556 (W.D. Wash. 1986); and Nemours Found. v. Gilbane, 632 F. Supp. 418 (D. Del. 1986).

New York State cases addressing this issue include Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d

recent decision in this area, In re Del-Val Fin. Corp. Sec. Lit., No. MDL 872, 1994 WL 395253 (S.D.N.Y. July 29, 1994), expressly approved the use of screening procedures in denying a motion to disqualify.

There are several policy arguments that support screening as a means of rebutting the presumption of shared confidences in order to avoid imputed disqualification. First, the rationale supporting imputed disqualification -- that responsible lawyers will, in performing their ethical obligations to one client, violate their ethical responsibilities to another client (or former client) by disclosing confidences or secrets obtained at a prior firm -- is "both unpalatable and unwarranted in fact." Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.10:207 (1992). Second, to prohibit a firm from continuing to represent a long-standing client or take on a significant new representation may be too severe a penalty for the firm and its clients if effective screening procedures are available. The fact that screening is expressly permitted in the case of government lawyers arguably demonstrates its acceptance and effectiveness in other contexts. Finally, proponents have argued that without screening the ethical rules would make "typhoid Marys" out of many mid-career lawyers, and that the use of screening devices is thus a necessity.

The use of screening procedures has been gaining in acceptance in recent years. Professors Hazard and Hodes state that the approach, which was considered but rejected by the Kutak Commission, "has merit." Other noted experts disagree. See Monroe H. Freedman, The Ethical Illusion of Screening, Legal Times, Nov. 20, 1995, at 24. The proposed Restatement of the Law Governing Lawyers advocates the use of screening in private as well as governmental contexts.

437, 610 N.Y.S.2d 128 (1994); People v. Mattison, 67 N.Y.2d 462, 494 N.E.2d 174, 503 N.Y.S.2d 709 (1986); cert. denied, 479 U.S. 984 (1986); People v. Shinkle, 51 N.Y.2d 417, 415 N.E. 2d 909, 434 N.Y.S.2d 918 (1980); Cardinale v. Golinello, 43 N.Y.2d 288, 372 N.E.2d 26, 401 N.Y.S.2d 191 (1977).

See Restatement of the Law Governing Lawyers § 204(2), Proposed Final Draft No. 1 (March 29, 1996).[12] At least twelve states, Arkansas, California, Delaware, Florida, Kentucky, New Jersey, Tennessee, Virginia, Pennsylvania, Illinois, Michigan and Oregon, have either specifically added a screening provision into their ethical codes or permit screening through judicial decision or ethics opinion.[13] The Pennsylvania provision (on which the Restatement is modeled) is illustrative:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired [protected information], unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

This provision appears to be in line with developing federal cases, such as Del-Val, which have denied motions to disqualify where appropriate screening devices have been utilized.

The proposed amendments to DR 5-108 would incorporate the substance of Model Rules 1.9(b) and 1.10(b) into the New York Code and would add a new subsection (D) to permit

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[12] The Restatement would remove imputation through screening only where confidential information possessed by the lawyer switching firms "is unlikely to be significant" in the matter; in the case of government lawyers, effective screening would remove imputation even when the confidential information may be significant in the succeeding representation. Under the Restatement, the circumstances of the lawyer's prior involvement and the nature and relevance of confidential information in the lawyer's possession would determine whether screening could be used, in lieu of client consent, to remove imputation.

[13] For example, the Tennessee Supreme Court Board of Professional Responsibility, in its Formal Opinion 89-F-1 18, 5 Law. Man. Prof. Conduct 121 (1989), approved of this technique. See also cases cited by Hazard & Hodes, § 1.10:207, at 334.1 n. 7.

screening to cure conflicts caused by former client relationships.[14] The proposed DR 5-108(D) is patterned after the rule that has been in effect in Oregon since 1983. Several members of the Committee prefer the Pennsylvania formulation over the Oregon model but all agree that adopting the Oregon model would be far better than maintaining the status quo.

8. DR 5-109 Organization as Client.

The Committee believes that the proposed amendments to DR 5-109 and EC 5-18 do not go far enough and offer the following comments and suggestions for the State Bar Association.

Both the New York Code and the Model Rules have adopted the entity theory of representation. The basic premise of the entity theory is that "[a] lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." EC 5-18. The Model Rules are to the same effect. Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Stating that the client is the entity merely begs the question, who within the entity is the client? Is it the Board of Directors, management, or the shareholders of the corporation? Are all corporate officers, directors and employees the client? Are subsidiaries and affiliates part of the same client? Neither the New York Code nor the Model Rules provide clear answers to these questions.

[14] The State Bar Committee has also proposed that DR 5-108(A) be amended to make clear that former government lawyers need only satisfy the less restrictive standards of DR 9-101(B) and do not have to satisfy the standard set forth in DR 5-108(A). The Committee supports this clarifying change.

The New York Code incorporates much of MR 1.13. The only significant difference between the New York Code and the Model Rules is that the former does not include MR 1.13(c), which provides that:

> If despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

This provision appears to limit a lawyer's options when faced with a corporate client whose highest authority insists upon action, or refuses to act, in a manner that is clearly in violation of law and is likely to result in substantial injury to the corporation, to that of withdrawal. The option of revealing to third parties the entity's intention to act does not exist, placing MR 1.13 in stark contrast to MR 1.6(b)(1), which in other contexts allows (but does not require) a lawyer to reveal confidences if the lawyer believes it reasonably necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MR 1.13(c) is obviously more restrictive than MR 1.6(b)(1) and may be viewed as setting a double standard for individual clients as opposed to organizational clients. Professors Gillers and Freedman have been highly critical of this aspect of the Model Rules. See Gillers, Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure, 1 Geo. J. Legal Ethics 289 (1987) Freedman, Understanding Lawyers' Ethics pp. 201-205 (1990).[15]

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[15] Professor Gillers has advocated the following revision of MR 1.13(c);

> If despite the lawyer's efforts in accordance with paragraph (b), the lawyer reasonably believes that the highest authority that can act on behalf of the organization
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> (i) has violated or intends to violate a legal obligation to the organization by action or inaction that furthers the personal or financial interests of members of that authority and that has caused or is likely to cause substantial injury to the organization, or
>
> (ii) has authorized or acquiesced in a prospective or continuing violation of law that might

The New York Code, on the other hand, does not provide for the same dichotomy of treatment. The failure to include the equivalent of MR 1.13(c) in the amended EC 5-18 leaves a lawyer representing an entity in the same position as a lawyer representing an individual client. Under DR 4-101(C)(3), a lawyer is permitted (but not required) to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This provision, which has been criticized by some because it only applies to crimes and does not apply to conduct that is merely fraudulent, is nevertheless broader in scope than its counterpart in the Model Rules in that it encompasses all crimes, not merely those which are likely to result in imminent death or substantial bodily harm.

The above-cited rules have been criticized in a number of additional respects. For example:

(1) Although the rules refer to the "appropriate authority" or the "highest authority" that can act on behalf of the organization as determined by applicable law, they do not identify who within the entity meets that description. The Comment to the Model Rules states that "ordinarily" the highest authority is the board of directors or similar governing body, but then goes

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> reasonably be attributed to the organization and that is likely to cause substantial injury to the organization, the lawyer may disclose client confidences to the extent necessary to prevent or rectify the injury. In acting as authorized in this paragraph, the lawyer shall make reasonable efforts to assure that the extent of the disclosure is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization. The lawyer's authority to disclose pursuant to this paragraph shall continue notwithstanding termination of the attorney-client relationship between the lawyer and the organization prior to the disclosure.

This provision would permit a lawyer to reveal confidences to the extent necessary to prevent or rectify an injury cause (i.e., past conduct) or likely to be caused (future conduct) to the corporation, and would make clear that a lawyer's right to do so continues to exist after termination of the representation. One or more members of the Committee initially advocated the adoption of the Gillers formulation of MR 1.13(c) on the grounds that its specificity provided clearer guidance to in-house counsel. Other members of the Committee disagreed, finding that the Gillers formulation raised as many questions as it answered. All agreed, however, that the reference in subparagraph (ii) of the Gillers formulation, requiring the lawyer to "make reasonable efforts to assure that the extent of the disclosure is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization," would be a worthwhile addition to the rule. The Solomon Brothers case was cited as an example of the problems faced by in-house counsel which would be ameliorated by the insertion of MR 1.13(c), along with its proposed revisions, into the New York Code.

on to say, however, that "applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example in the independent directors of a corporation." The members of the Committee believe that the issue is one of substantive law and not ethics.

(2) The rules do not make clear whether a corporate lawyer owes duties of loyalty, zeal and confidentiality to shareholders. Both the Model Rules and the New York Code refer to "shareholders" as constituents of the corporation, along with officers, directors and employees, but make it clear that the entity, not the shareholders or other constituents, is the client. The rules provide no guidance as to whether and, if so, under what circumstances a corporate lawyer may be permitted to go beyond the board of directors to the shareholders as the "highest authority" that can act on a given issue. Again, this would appear to raise an issue of substantive law not appropriate for resolution in a code of ethics.

(3) In shareholder derivative actions, may a lawyer represent both the corporation, as the nominal party on whose behalf the action has purportedly been brought, and individual officers and/or directors named as defendants? Can the lawyer represent the individual defendants alone? Neither the Model Rules nor the New York Code address this issue squarely. The Comment to the Model Rules states that:

> Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyers like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 [the general conflict of interest rule] governs who should represent the directors and the organization.

The problem with this formulation is that it is often difficult to determine at the commencement of a derivative action whether the charges are "serious" enough to cause a conflict between the interests

of the entity and its board of directors or management. Professors Hazard and Hodes take the position that where the allegations challenge a business judgment of the board, the board should be prima facie entitled to control the defense of the litigation, but where the claims involve serious charges of fraud or mismanagement, calling into questions directors' and/or management's discharge of their duty of loyalty to the corporation, both the management group and the corporation "may have to obtain independent representation." Hazard & Hodes, supra, § 1.13:602 at p. 433. The consensus of the Committee was that the Hazard & Hodes formulation of the rule seemed very practical and consistent with federal case law. As a result, the members concluded that it would be preferable either to include such language in the code or in an ethical consideration, with one modification that would make clear that separate representation may be required where officers and/or directors charged with wrongdoing clearly have differing or adverse interests.

(4) At what point in time should a lawyer provide what has been described as a "Miranda-type" warning to constituents of a corporation, as contemplated by DR 5-109(A) and MR 1.13(d)? MR 1.13(d) says that this is to be done "when it is apparent that the organization's interests are adverse" to those of the individual in question. The New York Code says in DR 5-109(A) that it is to be done when "it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing." What if an officer, director or employee confides in a lawyer that he or she is engaged in a crime or fraud on the incorrect assumption that the lawyer is representing him or her and that any information disclosed will be held confidential? May the lawyer use that information if no "warning" was given to the individual by the lawyer before disclosure to the lawyer? Professor Freedman has suggested that the rules state that warnings should be provided "at the outset of the lawyer-client relationship." Freedman, supra, at p. 200-201.

(5) Both the Model Rules and the New York Code provide that a lawyer's obligation to proceed to a "higher authority" only applies when a lawyer learns of conduct that is a "violation of a legal obligation" to the organization, or a "violation of law that may be imputed to the organization," and is "likely to result in substantial injury to the organization." Thus, if the conduct in question is not likely to be detected, or only involves conduct that may give rise to civil remedies (i.e., does not amount to a violation of law), or if the penalties are not likely to be "substantial," the lawyer's obligations are substantially circumscribed. Again, the standard seems inconsistent with other provisions of the Code, such as DR 2-110(C), which permits a lawyer to withdraw from representation whenever a client "persists in a course of action . . . that the lawyer reasonably believes is criminal or fraudulent," where the client "by other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively," or where the client "insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited by the Disciplinary Rules."

(6) MR 1.13(c) permits withdrawal only where the organization persists in conduct that is "clearly a violation of law and is likely to result in substantial injury to the organization." MR 1.16(b), however, permits a lawyer to withdraw from representing an individual client where the client persists in conduct that the lawyer "reasonably believes" is criminal or fraudulent. Is there a rational basis for a more exacting standard for corporate counsel? After considerable discussion, the members of the Committee concluded that a modified version of MR 1.13(c) should be added to the New York Code that would conform with DR 4-101(C), by permitting a lawyer, in addition to the option of withdrawing or resigning (in the case of in-house counsel), to reveal confidences or secrets to the extent permitted therein. It was agreed that MR 1.13(c) as written may unduly (and perhaps unintentionally) limit the options available to corporate counsel, and that the responsibilities of a

lawyer for an entity in dealing with criminal or fraudulent conduct should be coextensive with the responsibilities that exist with respect to individual clients.

The proposed amendments to the New York Code contain certain similarities to the recent revisions to Section 155 of the ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996), which, in addition to incorporating the substance of MR 1.13(b), would also expressly recognize the right of an organizational lawyer in certain circumstances to (a) withdraw from the representation and (b) disclose the breach to persons outside the organization, when the lawyer reasonably believes that:

> (a) the harm to the organization of the threatened breach that could be avoided or limited by disclosure is likely to exceed substantially the costs and other disadvantages of such disclosure;
>
> (b) no other measure could reasonably be taken by the lawyer within the organization to protect its interests adequately; and
>
> (c) following reasonable inquiry by the lawyer, no constituent of the organization, who is authorized to act with respect to the question of disclosure and who is not complicit in the breach, is available and willing to make a decision about such disclosure.

In the event that the text of MR 1.13(c) is added to the New York Code, it may be advisable either to move the text of EC 5-18 into the Disciplinary Rules or, alternatively, to move the text of MR 1.13(c) into the EC. The former is the preferred approach of the Committee.[16]

[16] The Committee supports two other amendments proposed by the State Bar Committee: (a) the insertion of additional guidance in EC 5-18 for lawyers serving or asked to serve as directors of entity clients, the text of which is derived from the Comments to MR 1.7, and (b) the insertion of language suggesting that representation of a corporation or similar entity "does not necessarily constitute representation of all of its affiliates." Reference is made to ABA Formal Op. 95-390, recently issued on this subject, which, together with the proposed addition to EC 5-18, provides substantial guidance to lawyers on this subject.

In light of the above, the Committee suggests that consideration be given to revising DR 5-109 (B) and (C) to read as follows:

DR 5-109 Conflict of Interest - Organization as Client.

* * *

B. A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer shall keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, the lawyer may learn that an officer, employee or other person associated with the entity is engaged in action, refuses to act, or intends to act or to refrain from acting in a matter related to the representation that is a violation of a legal obligation to the entity, or a violation of law which reasonably might be imputed to the entity, and is likely to result in substantial injury to the entity. In such event, the lawyer shall proceed as is reasonably necessary in the best interest of the entity. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the entity and the apparent motivation of the person involved, the policies of the entity concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the entity and the risk of revealing confidences and secrets of the entity. Such measures may include among others: asking reconsideration of the matter, advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the entity, and referring the matter to higher authority in the entity not involved in the wrongdoing, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the entity as determined by applicable law. Occasionally a lawyer for an entity is requested to represent a stockholder, director, officer, employee, representative, or other person connected with the entity in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present. For example, in shareholder derivative litigation, a lawyer for the organization may represent individual officers or directors named as defendants unless the lawyer is convinced that differing interests are present, such as when serious charges of fraud or mismanagement have been leveled against individual officers and/or directors, in which case such officers and/or directors may have to obtain independent representation.

C. If, despite the lawyer's efforts in accordance with DR 5-109(B), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may, in addition to revealing information to the extent permitted by DR 4-101(C), withdraw from the representation in accordance with DR 2-110. In acting as authorized by this paragraph, the lawyer shall make reasonable efforts to assure that the extent of any disclosure of confidences or secrets is as restrictive as possible consistent with the goal of avoiding or rectifying injury to the organization.

While the Committee supports the balance of the proposed amendments to DR 5-109(B) and EC 5-18, it believes that the text of new subsection (B) is redundant in that the same text appears verbatim in EC 5-18. That text should be deleted from the EC if the proposed amendment is adopted.

9. DR 7-104 Communicating with Represented and Unrepresented Persons.

The Committee supports the proposed amendments to DR 7-104. The change of the word "party" to "person" in DR 7-104(A)(1) was viewed by most (but not all) members as a clarification rather than a substantive change in the rule. In reaching this conclusion, the members supporting the change pointed to the language of DR 7-104(A)(2), MR 4.2 and ABA Formal Opinion 95-396 (July 28, 1995), which in interpreting MR 4.2 (before it was amended in 1995 to apply to represented "persons" not "parties") concluded, inter alia, that the rule was intended to (and should) apply equally to civil and criminal matters and to all "persons" (and not just parties) known to be represented by counsel.

Having said this, the Committee recognizes that much controversy has surrounded the application of DR 7-104(A)(1) to criminal prosecutions and, in particular, to the promulgation of the Justice Department's Rule on Ex Parte Communications (the "DOJ Ex Parte Rule"), 59 Fed. Reg. 39910 (Aug. 4, 1994) (to be codified at 28 C.F.R. Part 77). Justice Department officials have argued

that changing "party" to "person" in the rule would create special problems for the government in conducting undercover investigations (which often involves counselling of undercover operatives by government lawyers) and that, accordingly, civil and criminal cases should be treated differently.

The proponents of the proposed amendment to DR 7-104(A)(1) on the Committee recognize the need to balance the legitimate interests of the government in pursuing criminal investigations, particularly undercover investigations, against protecting the sanctity of the attorney/client relationship. In their view, the appropriate vehicle for achieving that balance is through judicial interpretation of the "authorized by law" exception rather than through agency rulemaking.[17] These members believe that, as a matter of policy and ethics, no distinction should be drawn between civil and criminal cases and that the rule against ex parte contacts should apply to represented targets and, in the grand jury and post-indictment context, represented witnesses. While some members viewed the "authorized by law" exception as too ambiguous and inconsistently applied, a clear majority were of the view that a more precise bright-line standard through amendment to the rules would not be achievable until a national consensus could be reached -- which all members of the Committee would prefer to see. We urge the State Bar Association, federal and state prosecutors and the criminal defense bar to engage in a constructive dialogue in an effort to reach consensus on this issue. Our support for the proposed change of the word "party" to "person" in DR 7-104(A)(1) should not be read either as a criticism or endorsement of the Justice Department's

[17] In the federal courts, a considerable body of case law interpreting the "authorized by law" exception has developed, which the State Bar Association is urged to consider in attempt to reconcile the competing interests of government and defense counsel. See Grievance Committee for Southern Dist. of New York v. Simels, 48 F.3d 640 (2d Cir. 1995); United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); United States v. Pinto, 850 F.2d 927 92d Cir., cert. denied, 469 U.S. 1161 (1985); United States v. Jamil, 707 F.2d 638 (2d Cir. 1983); United States v. Massigh, 307 F.2d 62 (2d Cir. 1962), rev'd on other grounds, 377 U.S. 201 (1964).

position, but rather as encouragement to both sides in this debate to work together to resolve the issue.

The Committee also supports the adoption of new subsection (B) which makes clear that in a civil matter clients should be free, with or without the encouragement of counsel, to communicate with each other in an effort to resolve any dispute. The proposed amendment is consistent with the recommendation made in 1994 by the Association of the Bar's Committee on Professional Responsibility. See Report of the Committee on Professional Responsibility of the Association of the Bar of the City of New York, A Proposal To Amend DR 7-104(A) To Permit Lawyer-Induced Communications Among Represented Parties, 50 Record of the Ass'n 181 (Aug. 1994). Some concern was expressed that inclusion of language requiring advance notice to counsel could be counterproductive since lawyers themselves may at times become obstacles to settlement. A majority of Committee members, however, favored the inclusion of the advance notice provision.

The ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12, §§ 158-162 (May 15, 1996) takes a broader approach to the anti-contact rule than either the Model Rules or the New York Code. The general anti-contact rule would prohibit communications with represented persons unless (a) the communication is by a government investigating lawyer[18] or concerns communications with a public officer or agency; (b) the lawyer is a party and represents no other client in the matter; (c) the lawyer's communication responds to an inquiry by the represented person that seeks specific factual information and conveys only such information; (d) the communication is authorized by law; (e) the communication reasonably responds to an emergency;

[18] Significantly, §160 of the proposed Restatement states that "a prosecutor may communicate or cause another to communicate with a person accused or suspected of a crime if constitutional and other legal rights of the person are observed." The Comment to the rule goes on to state that a "suspect or accused person represented by counsel may initiate communication with a prosecutor without knowledge of counsel, even after the constitutional right to counsel attaches."

or (f) the other lawyer consents. The rule is not intended to prohibit a lawyer from assisting his/her client in communicating with another represented person (on any subject), unless the lawyer thereby seeks to interfere with the lawyer-client relationship of the other person or to deceive or overreach the other person.

The proposed Restatement (which is still under advisement and subject to change) thus expressly attempts to accommodate the government's need to conduct legitimate undercover operations, and also allows lawyers great latitude in encouraging client-to-client contacts. It does not specifically deal, however, with the civil settlement context.

10. DR 7-107 Trial Publicity.

The Committee supports the proposed amendments to DR 7-107(A); we are concerned, however, that the proposed amendments do not go far enough in addressing the constitutional issues raised in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), and suggest that the State Bar Association consider further amendments to the rule, as described below, to alleviate such concerns and reduce the risk of future constitutional attack.

The landmark case regarding ethical constraints on trial publicity is Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). In Gentile, which was a split decision, the Supreme Court, per Justice Rehnquist, upheld the standard adopted by MR 3.6 and by New York's DR 7-107(A) of "a substantial likelihood of materially prejudicing an adjudicative proceeding." The Court, per Justice Kennedy, however, held that the "safe harbor" provision of Nevada's MR 3.6, which was substantially similar to the old MR 3.6, was unconstitutionally void for vagueness. The safe harbor provided that notwithstanding the prohibition on commenting about trials in a way that would have a "substantial likelihood of materially prejudicing" the trial, an attorney may nevertheless state "without elaboration

. . . the general nature of the claim or defense," and various other elements of the case which were listed in the rule. Justice Kennedy ruled that the words "without elaboration" and "general" provided lawyers with insufficient guidance and the rule was accordingly held void for vagueness. See id. at 1048.

The problems created by the Gentile decision have been extensively discussed in the literature. See Day, The Supreme Court's Attack on Attorney's Freedom of Expression: The Gentile v. State Bar of Nevada Decision, 43 Case W. Res. L. Rev. 1347 (Summer 1993); Berkowitz-Caballero, In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules, 68 N.Y.U. L. Rev. 494 (1993). The ABA's response to the Gentile decision was simply to drop the word "general" from paragraph (b)(1) and to add subsection (c) to MR 3.6. But query as to whether these changes are sufficient to overcome Justice Kennedy's concerns?

In response to the Gentile decision, the Association of the Bar's Committee on Professional Responsibility undertook a comprehensive re-examination of DR 7-107. See Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, The Need for Fair Trials Does Not Justify a Disciplinary Rule that Broadly Restricts and Attorney's Speech, 20 Fordham Urb. L.J. 881 (Summer 1993) (hereinafter the "City Bar Report"). The City Bar Report noted two problems with DR 7-107. First, DR 7-107 uses substantially the same safe harbor provision that was struck down as unconstitutionally vague in Gentile. Second, the Report noted that there exists an inherent conflict between DR 7-107(B)(4), which prohibits a statement of opinion concerning the guilt or innocence of the defendant, and DR 7-107(C)(1), which permits a statement concerning the general nature of the claim or defense. According to the City Bar Committee:

> There can be nothing more "general" than the defendant counsel's statement that "my client is innocent," and yet that is the very type of

> statement which appears to run afoul of subsection (b)(4). Such a whipsaw effect undoubtedly violates the First Amendment under the analysis in Gentile.
>
> The Committee went on to propose that DR 7-107 be amended to read as follows:
>
> During a jury trial, and during the month immediately preceding the scheduled commencement of that trial, no lawyer participating in or associated with that trial shall make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will present a clear and present danger of material prejudice to the trial.

City Bar Report at *7. This proposal would materially change the existing rule in a number of significant respects: (a) it would only apply to jury trials; (b) it would be temporally limited to statements during the trial or in the month immediately preceding the scheduled commencement of trial; (c) it would adopt a "clear and present danger" test as opposed to the "substantial likelihood of

materially prejudicing an adjudicative proceeding" test, which the Supreme Court expressly upheld in Gentile;[19] and (d) it would eliminate subsections (B) and (C).[20]

The ABA at its 1994 Annual Meeting also adopted an amendment to MR 3.8, dealing with special responsibilities of a prosecutor. The amendment added a new subsection (g), providing that in a criminal case a prosecutor shall:

> except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

This new paragraph was intended to supplement MR 3.6. The comment to the amendment states that it is not intended to restrict the statements that a prosecutor may make which may comply with Rule 3.6, but rather is intended to encourage prosecutors to avoid, wherever

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[19] The ABA Litigation Section also advocated this change when the amendments to MR 3.6 were under consideration by the ABA. The official commentary to the revisions indicate that this proposal was rejected.

[20] The Committee disagrees with the proposal put forward by the Association of the Bar's Committee on Professional Responsibility, for the following reasons. First, while the risk of prejudice occurs less frequently in the context of civil and/or non-jury trials, it exists nevertheless. While it is true that the right to a fair trial may not be threatened by a rule permitting unlimited extrajudicial statements by lawyers in most civil and/or non-jury cases, allowing unrestricted public contacts only encourages unprofessional behavior. The New York Code itself draws a distinction between criminal and civil matters, as well as jury and non-jury trials, as factors to be considered in assessing the propriety of extrajudicial statements. While the present rule admittedly sets a less bright-line test than the City Bar proposal, it recognizes the potential for prejudice that may exist in civil cases and non-jury trials and attempts to set an appropriate balance in the treatment of such cases.

Second, although the members of the Committee are sympathetic to the concerns expressed by the Association of the Bar's Committee on Professional Responsibility, we do not believe that a temporal limitation on extrajudicial statements would eliminate the risk of prejudice defendants face in highly publicized cases, where the public's perception of an accused's guilt or innocence (or a defendant's liability) can be (and frequently is) influenced and shaped by the media's early reporting of events, often by means of lawyers' "sound bites" commenting on the evidence or strength of the prosecutor's or defendant's case.

Finally, adoption of a "clear and present danger" test, apparently borrowed from prior restraint cases, appears unnecessary and unwise given the Supreme Court's endorsement in Gentile of the "substantial likelihood" test found in DR 7-107.

possible, "comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused."[21]

DR 7-103, the New York Code counterpart to MR 3.8, differs from the Model Rule and contains no separate provision addressing extrajudicial statements by prosecutors. The New York provision has been criticized on the grounds that DR 7-103 and 7-107, read together, place significantly more restraints on defense counsel than prosecutors.[22] The members of the Committee, however, believe that the inclusion of MR 3.8 in the New York Code would only engender confusion as to the standard applicable to prosecutors; that the provisions of DR 7-107, as amended, should apply equally to prosecutors and defense counsel; and that the text of MR 3.8 is largely superfluous.[23]

In considering the proposed amendments to DR 7-107, various members of the Committee expressed concern that lawyers (prosecutors and defense counsel alike) routinely appear to disregard their ethical obligations by engaging in prejudicial pretrial and trial publicity, and that, apart from occasional action taken against criminal defense counsel and "gag" orders (that by and large have also proven ineffective), judges have not enforced the proscriptions of DR 7-107 and/or

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[21] The proposed Restatement of the Law Governing Lawyers takes a more simplistic approach to the issue of publicity. Section 169 of the proposed Restatement would provide as follows:

> In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a lay fact finder or influencing or intimidating a prospective witness in the proceeding.

This provision is functionally equivalent to the first sentence of DR 7-103(A).

[22] This point is discussed in more detail by Professor Freedman. See Freedman, Muzzling Trial Publicity: New Rule Needed, Legal Times, April 5, 1993, at 24; Freedman, Silencing Defense Lawyers, Legal Times, May 6, 1991, at 22.

[23] No member was able to identify a statement covered by MR 3.8 that would not also be covered by the amended DR 7-107.

MR 3.6. In addition, many lawyers perceive that the playing field is not level when it comes to controlling prejudicial pretrial publicity.

The decision in Gentile, to the extent it can be read to promote, on First Amendment grounds, a lawyer's right to make extrajudicial statements purportedly to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or client, was viewed by some as only exacerbating the problem. All members of the Committee believe that cases should be tried in the courtroom, not in the press, and that rules such as DR 7-107, MR 3.6 and Local Criminal Rule 7, which attempt to strike an appropriate balance between a defendant's right to a fair trial and the public's right to know, should not be viewed as an empty shell, but should be strictly followed and enforced. The failure to follow and enforce such rules only impairs the public's already poor perception of our profession and undermines the fairness of our judicial system.

Having said all this, it was recognized that, notwithstanding the frustration expressed by various members of the Committee, there should be an ethical rule on the books that sets forth a standard all lawyers should strive to achieve. Not wanting to reinvent the wheel, four different versions of the rule were considered: DR 7-107, MR 3.6 (as amended in 1994), Local Criminal Rule 7,[24] and the Association of the Bar's proposed rewrite of DR 7-107, which would only apply to jury trials and provide temporal limits within which certain extrajudicial statements would be proscribed.

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[24] On May 28, 1996, the Federal Bar Council Committee on Second Circuit Courts issued a report entitled "Local Rules Limiting Attorney Speech in Criminal Proceedings." The report, which was the product of several years of study and debate, concludes that Local Criminal Rule 7, as written, unconstitutionally burdens the First Amendment rights of lawyers. The report goes on to propose four sets of changes to bring the rule "into harmony" with the Constitution. Thus, the report proposes that Rule 7(a) be amended by (1) replacing the "reasonable likelihood" standard with a "substantial likelihood" standard; (2) clarifying that during criminal investigations the prohibition applies exclusively to government lawyers; (3) clarifying that the rule applies both to lawyers and non-lawyers whom the lawyers supervise; and (4) eliminating the categorical prohibition of speech on certain subjects. The report also proposes (a) that Rule 7(c) be amended to authorize trial judges to issue "special orders" to Drotect fair trial rights against the risk of prejudice in any appropriate criminal case, (b) that the rule explicitly pre-empt disciplinary provisions under General Rule 4(f), and (c) that the rule specifically provide that violators be subject to disciplinary action according to General Rule 4.

After considerable debate, it was agreed that, in light of Gentile, the preferred formulation was the one contained in MR 3.6, as amended; rather than recommend the adoption of MR 3.6, however, the Committee concluded that it would be better to amend DR 7-107 to incorporate the changes made in MR 3.6 in 1994 (other than the deletion from the rule of the list of specific examples of types of speech that would breach the standard set forth in the rule, which can now be found in the comment to MR 3.6 in lieu of the text). This is the approach taken by the State Bar Committee in its proposed amendments to DR 7-107.

Having concluded that MR 3.6 was the preferred formulation,[25] however, the Committee recognized that the proposed amendments to DR 7-107 do not address the concerns expressed in Gentile with respect to the language of DR 7-107(C)(1), which permits a lawyer to state "without elaboration" the "general nature of the claim or defense." We suggest that the State Bar Association consider amending DR 7-107(C)(1) to conform to the amendments to that subsection made by the ABA in 1994, to read as follows [new material underscored]:

> C. Provided that the statement complies with DR 7-107(A), a lawyer involved with the investigation or litigation of a criminal or civil matter may state the following:
>
> 1. The claim, offense or defense involved and, except where prohibited by law, the identity of the victim or other persons involved.

In addition, we suggest that consideration be given to the following additional changes to DR 7-107(A), (B) and (C):

> A. A lawyer participating in or associated with the investigation, prosecution or defense of . . . shall not make an extrajudicial statement that goes beyond the public record that a reasonable person. . . .

[25] A minority of members urged that the text of MR 3.6(d) be deleted from the proposed amendments to the new York Code on the grounds that it only encouraged "tit for tat" escalation of prejudicial publicity.

B. A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it . . . relates to:

1. The character, credibility, reputation or criminal record of a party, suspect or accused in a criminal matter or the character, credibility, reputation or criminal record of a witness, or the expected testimony of a party or witness.

* * *

3. The performance or result of any examination or test . . . or the identity or nature of physical evidence seized or expected to be presented.

C. 7. In a criminal case, in addition to the information set forth in DR 7-107(C)(1) through (6):

* * *

e. That the accused denies the charges.

OTHER SUGGESTED AMENDMENTS

In addition to commenting on the specific amendments to the New York Code that have been proposed, the Committee, in the course of its rule-by-rule analysis, identified a number of additional provisions in the New York Code that raise issues that we respectfully suggest be considered by the State Bar Association. They are discussed seriatim below.

1. DR 4-101 Preservation of Confidences and Secrets of a Client.

The confidentiality of communications between the attorney and the client is crucial to the effective assistance of counsel in our adversary system of justice. See EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."). That a client may be sure that what he or she tells a lawyer will

remain confidential fosters truth telling and ultimately the representation of the client's interests in litigation.

There are limits, however, to the confidentiality of attorney-client communications. For example, if a client informs a lawyer that the client is about to commit a crime, the rules permit the lawyer to reveal such intention under prescribed circumstances. This is known as the "crime/fraud" exception to client confidentiality. The crime/fraud exception is a corollary to the rule, found in both the Model Rules and the New York Code, which prohibits a lawyer from assisting a client in committing a fraud or crime. See MR 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); DR 7-102(A)(7) ("In the representation of a client, a lawyer shall not [c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.").

Both the Model Rule and New York Code provisions have been criticized to the extent they only apply (a) where necessary to prevent a crime or criminal act (b) by the client. Acts which the lawyer believes are likely to lead to death but which do not constitute a crime, and the prevention of such acts by persons other than the client, are not covered by the existing rules.[26]

The members of the Committee generally prefer the approach taken by the New York Code over that taken by the Model Rules (or the ALI). However, consideration should be given to expanding the rule in two respects: first, to permit a lawyer to reveal a confidence or secret if necessary to prevent a person other than the client from committing a crime; and second, to clarify the language in DR 4-104(C)(4) so as to prohibit a lawyer from revealing a confidence or secret to

[26] The ALI appears to be leaning toward adopting a rule that would permit disclosure to the extent necessary to prevent (a) "death or serious bodily injury" as a result of a "crime" that the client has committed or intends to commit, or (b) substantial financial loss as a result of a "crime or fraud" that the client has committed or intends to commit. See ALI Restatement of the Law Governing Lawyers § 117A, Proposed Final Draft No. 1 (March 29, 1996).

a third party, outside the context of a pending action or proceeding, in order to collect a fee. The present rule, which permits revelation of confidences and secrets whenever "necessary" collect a fee, presents an opportunity for widespread abuse. The members of the Committee believe that revelation of a confidence or secret should, as a matter of sound policy and ethics, be a last resort (to a tribunal) in an effort to collect a fee.

Incorporating these changes into DR 4-101(C)(3) would result in the following provision (new material underscored) which the Committee recommends be considered by the State Bar Association:

DR 4-101(C)(3) Preservation of Confidences and Secrets of a Client.

C. A lawyer may reveal:

* * *

3. The intention of a client or a person other than the client to commit a crime and the information necessary to prevent the crime.

4. Confidences or secrets necessary to establish or collect, in a proceeding pending before a tribunal, the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

2. DR 5-103(B) Avoiding Acquisition of Interest in Litigation.

Model Rule 1.8(e) generally prohibits a lawyer from providing financial assistance to his or her client, except that a lawyer "may advance costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." DR 5-103(B), on the other hand, generally prohibits a lawyer from providing financial assistance to the client, except that the lawyer "may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses." Both the Model Rules and the New York Code contain an exception to the above for indigent clients, on whose behalf a lawyer is permitted to pay court costs and the reasonable expenses of litigation.

A clear conflict exists between the rules in that MR 1.8(e) allows repayment to be contingent on the outcome of the case, whereas DR 5-103(B) requires that the client remain ultimately liable for the advance. Commentators such as Professors Gillers and Freedman have expressed a preference for MR 1.8(e) over DR 5-103(B), which was also the conclusion reached by

Judge Weinstein in County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990) (holding that the provisions of Fed. R. Civ. P. 23 reflect an overriding federal policy that supersedes DR 5-103(B) at least in the context of class actions); accord, Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991).

The Committee, based in large part on Judge Weinstein's reasoning in County of Suffolk, recommends that the language of MR 1.8(e) be adopted by the New York State Bar Association instead of the current text of DR 5-103(B). In reaching this conclusion, the Committee noted that the Association of the Bar's Committee on Professional Responsibility, in its Proposed Modification of DR 5-103(B), 50 Record of the Ass'n 260 (Feb. 1995), has itself urged the adoption of a modified version of MR 1.8(e) that would read as follows:

> A lawyer may pay, advance or guarantee court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

In support of this recommendation, the Committee on Professional Responsibility opined that the proposed rule "more closely reflects the realities of the practice of law and will enable clients of modest means access to the courts without posing the dangers of encouraging extreme attorney behavior or overreaching." According to the Committee, "jettisoning outmoded rules that are widely disregarded can only enhance the ethics of the profession, improving the practice of law by removing anachronistic restraints on access to the courts." We agree. Other authorities have also recognized that reimbursement, as a practical matter, almost never occurs. In re Union Carbide Corp. Consumer Prod. Bus. Sec. Lit., 724 F. Supp. 160, 165 (S.D.N.Y. 1989) (Brieant, J.); Weinstein, Jack B., Individual Justice in Mass Tort Litigation, at 76 (1995).

Several members of the Committee, while recognizing the realities of modern practice and the existence of substantial support for the adoption of MR 1.8(e), nevertheless expressed

reservations regarding the Model Rule. First, if and to the extent MR 1.8(e) was (and is) designed to enable clients of modest means to obtain access to the courts, the language of the rule itself is not so limited and would permit lawyers to underwrite the entire cost of litigation for clients that can afford to pay their own costs, thus encouraging speculation (or "trafficking") in litigation by lawyers. At the very minimum, the sentiment was expressed by these members that the practice of lawyers taking a financial interest in litigation where their clients can afford to pay was an unseemly one that should not be encouraged.

Second, if and to the extent Judge Weinstein's decision in County of Suffolk was based on policy considerations arising out of Fed. R. Civ. P. 23, those same considerations arguably do not apply, or do not apply to the same degree, outside the class action context. Permitting lawyers to advance costs is necessary in the class context in order to encourage the filing of such suits, which have high up-front costs that neither the named representative nor unnamed class members should in fairness be required or expected to pay. The same cannot be said for all private actions.

Section 48 of the proposed Restatement of the Law Governing Lawyers as currently drafted builds on the language in MR 1.8(c) by providing that:

> (2) A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client, except that the lawyer may[:
>
> > (a)] make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter[; and
> >
> > [(b) make or guaranty a loan on fair terms, the repayment of which to the lawyer may be contingent on the outcome of the matter, if: (i) the loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a

case because of financial hardship rather than on the merits; and (ii) if the lawyer does not promise or offer the loan before being retained.][27]

Subsection (2)(a) essentially tracks the language of MR 1.8(e), except that it also permits the making of loans and guarantees of loans in addition to advances of court costs and litigation expenses. The proposed Comment to § 48 states that "[a]llowing lawyers to advance [court costs and litigation] expenses is indistinguishable in substance from allowing contingent fees, and has similar justifications (see § 47, Comment c), notably enabling poor clients to assert their rights." This justification echoes the rationale given by the Association of the Bar's Committee on Professional Responsibility, but does not address, let alone resolve, the concerns noted above that were expressed by certain members of the Committee. Notwithstanding these concerns, it was the consensus of the Committee that MR 1.8(c), rather than DR 5-103(B) or the variation contained in the proposed Restatement, should be the preferred formulation.

The proposed revisions to the New York Code announced by the State Bar Committee do not contain any amendment to DR 5-103(B). The Committee recommends that the text of DR 5-103(B) be amended to read as follows (new material underscored):

[27] The Council to the Members of the ALI voted in October 1995 to delete Subsection (2)(b) and its accompanying commentary but agreed to their being printed in brackets in the Proposed Final Draft issued on March 29, 1996. The deletion of this provision was subsequently ratified by the ALI at its May 1996 annual meeting.

DR 5-103(B) Avoiding Acquisition of Interest in Litigation.

* * *

B. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

1. A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, the repayment of which to the lawyer may be contingent on the outcome of the matter.

2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

Another issue raised in connection with the Committee's consideration of this rule was whether lawyers should be allowed to advance "living expenses" to clients under MR 1.8(e) or DR 5-103(B). At least five states, Alabama, California, Louisiana, Minnesota and Texas, have modified the general prohibitions against financial aid to clients to allow for the advancement of living expenses. Others (e.g., Illinois) have done so by judicial decision. Professor Freedman has urged expanding the applicable rule to include the advancement of living and medical expenses that are reasonably necessary to enable the client to hold out through the delays of pretrial and trial, which it has been suggested are sometimes purposefully extended by defendants to force unfair settlements.

Certain members of the Committee believe that permitting lawyers to advance living and/or medical expenses would not further the public policy underlying MR 1.8(e) -- to promote access to the courts by clients of limited means. Allowing the advancement of expenses other than court costs and litigation expenses (which even MR 1.8(e) does not contemplate) would, in the opinion of such members, lead us down "a very slippery slope" that should be avoided.

As the previous discussion indicates, § 48(2)(b) of the proposed Restatement as approved in 1991 (but subsequently deleted) would, under certain circumstances, have permitted a lawyer to make or guarantee a loan on fair terms to enable a client to "withstand delay in litigation that might otherwise unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits," provided that the lawyer does not promise or offer the loan or guarantee before being retained. This provision was apparently intended to authorize a loan to pay living expenses in a situation where a financially pressed client might be tempted to accept an inadequate settlement offer in order to pay for food, clothing, shelter or medical expenses. A substantial majority of the Committee favor the initial Restatement approach with respect to living and medical expenses. The Committee therefore recommends that the State Bar Association consider an amendment to the New York Code that would accomplish this result.

3. DR 7-102 Representing a Client Within the Bounds of the Law.

Both the Model Rules and the New York Code require lawyers, in their capacity as "officers of the court," to reveal when a fraud has been perpetrated upon the court by a client and, under the New York Code at least, by other persons as well. See DR 7-102(B); MR 3.3(a).[28] DR 7-102(B)(1), dealing with client perjury or fraud, contains an exception for information protected as a "confidence or secret." DR 7-102(B)(2), dealing with perjury or fraud committed by a witness or party other than the client, does not contain the same limiting language found in (B)(1) (i.e., "except when the information is protected as a confidence or secret"). The omission of this language was

[28] Under the Model Rules, a lawyers duty of candor to third persons is covered by MR 4.1. MR 4.1(a) states that a lawyer shall not make a false statement of material fact to a third person in the course of representation of a client. MR 4.1 (b) requires disclosure of a material fact to a third person when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Candor to third persons under the New York Code is subsumed by DR 7-102.

probably an oversight. See New York State Bar Association Committee on Professional Ethics, Opinion No. 593 (June 30, 1980) (interpreting DR 7-102(B)(2) as including the exception for confidences and secrets present in (B)(1)). The Committee recommends that the State Bar Association consider amending DR 7-102(B)(2) by adding the limiting language found in (B)(1), thus make explicit what is implicit in the rule. With this change, DR 7-102(B)(2) would read as follows (new material underscored):

B. A lawyer who receives information clearly establishing that:

* * *

2. A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal, except when the information is protected as a confidence or secret.

4. DR 7-109 Contact with Witnesses.

Model Rule 3.4(a) provides that "[a] lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." DR 7-109(A) states that "[a] lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." It has been stated that "Model Rule 3.4(a) . . . consolidates DR 7-109(A), DR 7-109(B), and DR 7-106(C)(7)." Solum & Marzen, Truth & Uncertainty: Legal Control of the Destruction of Evidence, 36 Emory L.J. 1085, 1132 (1987). Arguably, the Model Rule is a bit broader than DR 7-109(A) in that it expressly prohibits the destruction of evidence. See Comment, Limiting the Scope of Discovery: The Use of Protective Orders and Document Retention Programs in Patent Litigation, 2 Albany L.J. of Sci. & Tech. 175, 204 (1992) ("Unlike the Model Code, the Model Rules deal directly with the destruction of evidence.").

In Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991), a litigant's duty to preserve evidence was stated as follows: A litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery suit." See also Skeete v. McKinsey & Co., Inc., 1993 WL 256659

(S.D.N.Y. July 7, 1993) (Leisure, J.); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956) (Weinfeld, J.). These decisions have all adopted a more expansive view of a lawyer's duties under the New York Code than a literal reading might suggest.

A number of commentators have expressed a strong preference for Model Rule 3.4(a) or its Washington D.C. counterpart, which is more explicit than the Model Rule and provides that a lawyer shall not:

> Obstruct another party's access to evidence or alter, destroy or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good faith effort to preserve it and to return it to the owner, subject to Rule 1.6.

Section 178 of the ALI's proposed Restatement of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996) would, if adopted, specifically deal with a lawyer's "destruction," "falsification" or obstruction of evidence and would also prohibit a lawyer from counseling a client to destroy or suppress evidence when the client's activity would violate (a) a criminal statute dealing with obstruction of justice or a similar offense; or (b) a statute, regulation or ruling requiring the retention of the evidence.

The members of the Committee believe that the Model Rule provision, to the extent it deals with the alteration, destruction or concealment of evidence, and to the extent it provides that a lawyer shall not counsel or assist another person to do any such act, is a superior formulation to the New York Code, which only deals with the "suppression" of evidence that the lawyer or the client has a legal obligation to reveal or produce. The New York Code does not define "suppression," and it is unclear whether it encompasses alteration or destruction as well as concealment of evidence,

although it is possible that the drafters intended the Model Rule provision to be functionally equivalent to the original Model Code provision. A question was raised as to whether "suppression" requires an overt act on the part of the lawyer as opposed to passively allowing a client to destroy evidence. The Model Rule, to a certain extent, raises the same question in precluding a lawyer from "assisting" another person in destroying evidence. Particularly in light of the large number of federal and state statutes and regulations that mandate the retention of documents, and the adoption of written document retention and destruction policies by businesses, the view was expressed that a lawyer's ethical responsibilities should not include an affirmative duty to insure that clients comply with such laws, regulations or policies. Disciplinary action should be warranted, it was agreed, only where a lawyer provides affirmative advice or assistance to a client that results in an unlawful obstruction, alteration, destruction or concealment of evidence.

Other issues that were considered by the Committee with respect to the Model Rule and New York Code provisions included:

(a) Does the word "unlawfully" in MR 3.4(a) require a criminal act, or does it encompass anything a court might require such as a litigant's duty to preserve evidence as articulated in Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991)? The Comment to the Model Rule suggests that the intention was to make it unethical for a lawyer to act only where such conduct would constitute a criminal act. The D.C. counterpart, however, does not use the word "unlawfully" and thus arguably reaches conduct that is not criminal. After discussion, the members of the Committee concluded that the omission of the word "unlawfully" from the D.C. rule was a prudent choice given that obstruction of justice statutes are in many instances narrowly drawn and do not encompass all circumstances involving the alteration, destruction, or concealment of evidence or potential evidence. The proposed Restatement approach is in accord with this.

(b) Does the New York Code provision only apply to lawyer conduct or does it also apply to the suppression of evidence by other persons (upon the advice or with the assistance of the lawyer), as the Model Rule clearly provides? The answer, it was agreed, depended on how broadly the word "suppress" was defined. Without reaching a consensus as to the meaning of the word "suppress," all agreed that the Model Rule formulation was preferable due to its clarity on this point.

(c) Do DR 7-109(A) and/or MR 3.4(a) only apply to conduct in the context of a pending proceeding or action, or do they also apply to future proceedings whose commencement may be reasonably foreseeable? The Comment to the Model Rule seems to support the latter view; it was noted that the 1981 Draft of the Rule contained such language, but the final Draft replaced such language with the more ambiguous reference to material "having potential evidentiary value." The New York Code provides no guidance on the subject. The sense of the Committee was that pre-commencement conduct should be covered whenever the commencement of proceedings was reasonably foreseeable by the lawyer. What is "reasonably foreseeable," however, was viewed as a matter of degree and interpretation. The fact that litigation in today's society is regularly commenced in connection with certain events (such as corporate acquisitions, negative news announcements, employee firings and product failures), does not mean that litigation is "reasonably foreseeable" in all such circumstances. What is required is an assessment under all the circumstances that a specific claim by an identifiable plaintiff is reasonably likely to be filed.

In short, the Committee concluded that neither the New York Code nor the Model Rule formulation was ideal, that both contained latent or patent ambiguities, and that both could be improved, but that on balance the Model Rule provision was clearer, more in line with prevailing federal case law and thus preferable to its New York counterpart.

It was also the consensus of the Committee that, with minor modifications as indicated below, the first sentence of the D.C. counterpart to MR 3.4(a) was preferable to either the Model Rule or New York Code provisions. The preferred articulation of the rule (marked to show changes from the D.C. rule in effect), which would replace the existing DR 7-109(A), would read as follows:

> A lawyer shall not obstruct another party's access to evidence, or alter, destroy or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence may be the subject of discovery, disclosure or subpoena in any pending proceeding or one that is reasonably foreseeable.

The reference to "disclosure" was viewed as necessary in light of the Civil Justice Reform Act and the recent amendments to the Federal Rules of Civil Procedure. The reference to proceedings that are "reasonably foreseeable" was viewed as preferable to "imminent."

The proposed amendments to the New York Code do not contain any changes to DR 7-109. The Committee recommends that the proposed revisions described above be considered by the New York State Bar Association.

5. DR 9-101 Avoiding Even the Appearance of Impropriety.

As noted previously, the State Bar Committee has proposed that DR 5-108(A) be amended to make clear that former government lawyers need only satisfy the less restrictive standards of DR 9-101(B) and do not have to satisfy the conflict of interest rules set forth in DR 5-108(A). The Committee supports this clarifying change.

The members of the Committee believe that the rules relating to former judges or arbitrators should be equivalent to those applicable to other government officials and that the rules should be expanded to cover public interest organizations as well. The Committee therefore

recommends that consideration be given to the following proposed changes to DR 9-101 (new material underscored), all of which were viewed as consistent with existing or evolving federal policy:

DR 9-101 Avoiding Even the Appearance of Impropriety.

A. A lawyer shall not accept private employment in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such person, as a public officer or employee, or as an officer, director or employee of a pro bono or other public interest organization, unless the lawyer reasonably believes that the lawyer can adequately represent the interests of such private client and all parties to the proceeding and all appropriate government agencies or pro bono or other public interest organizations consent after full disclosure of the possible effect of such prior participation on the exercise of the lawyer's independent professional judgment.

B. Except as law may otherwise expressly permit:

1. No lawyer in a firm with which a lawyer disqualified under DR 9-101(A) is associated may knowingly undertake or continue representation in such a matter unless:

a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom;

b. Written notice is promptly given to the appropriate judicial body, arbitral association, government agency, or pro bono or other public interest organization, to enable it to ascertain compliance with the provisions of this rule; and

c. There are no other circumstances in the particular representation that create an appearance of impropriety.

2. A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a judge or other adjudicative officer, arbitrator or law clerk to such person, public officer or employee, or officer, director or employee of a pro bono or other public interest organization, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any

participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom.

3. A lawyer serving as a judge or other adjudicative officer, arbitrator or law clerk to such person, public officer or employee, or officer, director or employee of a pro bono or other public interest organization, shall not:

   a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

   b. Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified and obtained the consent of the judge or other adjudicative officer or arbitrator.

CONCLUSION

The Committee applauds the effort of the Special Committee and supports many of the proposed amendments to the New York Code. We further recommend, however, that consideration be given to certain other proposed amendments to the New York Code, as described above. We are pleased to have this opportunity to submit comments to the State Bar Association and would be happy to elaborate on our views with respect to the issues discussed herein.

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